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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

ABRAHAM BEAME, MICHAEL J. CODD, ABRAHAM N. GOODMAN, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, ALEX MAUTNER, VICTOR MARRERO, MORRIS TARSHIS, PAUL O'DWYER, THEODORE KARAGHEUZOFF, P.E., and THE CITY OF NEW YORK,

Petitioners,

-against-

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE and PAUL DUBRUL,

Respondents.

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

On June 2, 1977, the City defendants filed with this Court a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Briefs

in opposition to the City's petition were submitted by several parties, including the United States Environmental Protection Agency (EPA).

In its petition, the City cited Environmental Protection Agency v. Brown, 45 U.S.L.W. 4445 (May 3, 1977) and its companion cases for the proposition that the federal government may not require a state to pass regulations in order to implement its transportation control plan (City's petition for cert., pp. 31-32). In its brief in opposition, the EPA attempted to distinguish these cases from the case at bar on the ground that, here, the New York plan had been promulgated by the State of New York. (EPA brief, p. 14). This reply brief is addressed solely and specifically to the issue raised by the EPA, i.e.,

the ability of the Governor to "promulgate" a transportation control plan on behalf of the State, and thereby irreversibly commit the state, without legislative approval or ratification, to a detailed plan to discourage traffic in the Borough of Manhattan.*

ARGUMENT

Section 110 of the Clean Air Act (42 U.S.C. §1857c-5) provides that "[e]ach State shall...submit to the Administrator

*On August 5, 1977, Mr. Justice Marshall, in denying a stay sought by the City, filed an opinion which, inter alia, indicated that he viewed the petitioner's arguments on the merits as less than compelling, noting that the opinion of the Court of Appeals appeared "facially correct" (Opinion, p. 5). As we read the Rules of this Court a reply to that opinion is not in order. We would not, however, have our failure to respond to it taken as acquiescence in its correctness. Moreover, we note that the opinion is entirely silent on this critical issue, which is the linchpin of EPA's argument.

...a plan which provides for implementation, maintenance and enforcement" of air quality standards promulgated by the Administrator of the United States Environmental Protection Agency pursuant to the Act. In April, 1973, purportedly acting pursuant to this provision, then Governor Nelson Rockefeller submitted to the Administrator the "New York City Metropolitan Area Air Quality Implementation Plan Transportation Controls", which embodied a number of strategies designed to discourage automobile usage in the Borough of Manhattan. The plan submitted by the Governor had not been authorized or approved by the New York State Legislature or, indeed, by any other legislative body or officer. Nevertheless, the Second Circuit Court of

Appeals has held that the Governor's submission and the subsequent acceptance of the plan by the Administrator constituted the creation of a binding pact between the state and federal governments, and, by necessary implication, that the Governor of the State of New York was possessed of adequate power to irreversibly bind the State and City to the terms of a far-reaching and highly detailed plan for the control of traffic in New York City. In reaching this conclusion the Court of Appeals totally ignored one of the most fundamental precepts embodied in the constitutions of the United States and each of the fifty states: the doctrine of separation of powers.

The powers of the Governor are set forth in Art. 4, §3 of the New York State Constitution, and include the power "to

expedite all such measures as may be resolved upon by the legislature," and to "take care that the laws are faithfully executed." It is well-settled under New York law that the executive may not encroach upon the functions of the legislative branch nor interfere with its duties. Jaffe v. McGoldrick, 285 App. Div. 889, 137 N.Y.S. 2d 519, (2nd Dept. 1955); People ex rel. Ingenito v. Warden etc. Auburn Prison, 267 App. Div. 295, 46 N.Y.S. 2d 72, (4th Dept. 1943), aff'd, 293 N.Y. 803, 59 N.E. 2d 174, (1944). This principle of separation of powers is essential "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose [is] not to avoid friction, but, by means of the inevitable friction incident to the distribution of

governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting).

The nature and scope of executive power was discussed by this Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). That case involved the constitutionality of a presidential order directing the Secretary of Commerce to seize and operate most of the nation's steel mills in order to avert a strike by steel workers. The Court pointed out that executive power must derive either from the Constitution or from an Act of Congress. Id., p. 585. After noting the absence of statutory authorization for the President's action, the Court rejected the government's argument that seizure can

be sustained by virtue of the constitutional grant of executive power:

> "In the framework of our constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoeing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute..."

Id., p. 587.*

*Although Youngstown Steel involved issues arising under the federal Constitution, the principles set forth therein apply with equal force to the case at bar, since the relevant provisions of the New York State Constitution were modeled on the federal Constitution. The principles of separation of power arising from the N.Y. Constitution are thus the same as those arising under the federal Constitution. Cf. Loma Holding Corp. v. Cripple Bush Realty Corp., 147 Misc. 655, 265 N.Y.S. 125 (S. Ct. N.Y. Co. 1933), aff'd 240 App. Div. 1028, 268 N.Y.S. 995 (1st Dep't 1934), aff'd 265 N.Y. 463, 193 N.E. 272 (1934).

The power of a governor to enter into binding contracts with respect to matters falling within the province of the legislature was dealt with by this Court in Washington Market Co. v. District of Columbia, 172 U.S. 361 (1899). That case involved a suit by a public market seeking, inter alia, damages stemming from alleged wrongful interference by the District with rights arising under a contract between the plaintiff and the governor. In finding that the Governor lacked the authority to bind the District, the Court held:

> "The making of regulations with respect to the use of the market grounds and the establishment of a tariff of charges .... were beyond question within the province of the Legislative Assembly, and any assumption on the part of the Governor, either with or without the sanction of the

> Board of Public Works, of authority to conclude the Legislative Assembly in such matters, would have been purely ultra vires."

Id., p. 370.

In the case at bar, it is clear that the strategies agreed to by former Governor Rockefeller, e.g., the imposition of tolls on certain bridges, are by their nature legislative actions. Yet it is undisputed that the Legislature at no time approved or authorized the challenged Transportation Control Plan, nor did the Legislature delegate to the Governor power to irreversibly commit the State to a far-reaching scheme which, although directed ostensibly at reducing air pollution and controlling traffic in the New York Metropolitan area, will have a severe negative impact on the economy of New York City and the life styles of its

residents. In thus purporting to bind the State, former Governor Rockefeller clearly exceeded his executive authority and infringed upon the powers of the Legislature. Under the rule set forth in Washington Market Co. v. District of Columbia, supra, his attempt to commit the State must be treated as ultra vires, and the State cannot be deemed bound by his action.

Dated: New York, New York
September, 1977

Respectfully submitted,

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